

1  
2  
3  
4  
5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
7

8 SHAMECCA SWISHER,  
9 Plaintiff,  
10 v.  
11 JOANNE B. BARNHART, Commissioner of  
Social Security,  
12 Defendant.

No. C 05-01546 SI

**ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS**

13 \_\_\_\_\_ /  
14  
15 Defendant Joanne Barnhart has filed a motion to dismiss for lack of jurisdiction under Federal  
16 Rule of Civil Procedure 12(b)(1). Pursuant to Civil Local Rule 7-1(b), the Court finds this matter  
17 suitable for disposition without oral argument and therefore VACATES the hearing currently scheduled  
18 for March 3, 2006. Having carefully considered the pleadings filed by the parties, the Court hereby  
19 DENIES defendant's motion.

20  
**BACKGROUND**

21 Plaintiff Shamecca Swisher is an employee of the Social Security Administration ("SSA"). In  
22 2002, she applied for a GS-5/6/7 Service Representative position ("SR Position") in San Leandro.  
23 Plaintiff learned that she did not receive the position on June 25, 2002. On the same day, plaintiff  
24 emailed her union representative questioning why she did not get the position. The email stated in part:  
25

26 Hey Girl, what do you think about this? Is there any way I can see why I didn't get the  
27 SR position? I think I am not to[o] sure but the SR may have been selected off the  
streets. I don't remember if the announcement included off the street candidates plus she  
just happens to be Hispanic . . .

28 As a result of the email, plaintiff's union started an investigation of the reasons plaintiff was not given

the SR Position.

2       Seventy-six days later plaintiff contacted an Equal Employment Opportunity (“EEO”)  
3 Counselor, claiming that she had been subjected to race discrimination when she was not selected for  
4 the SR Position. On December 31, 2002, plaintiff filed a formal complaint with the SSA. On October  
5 4, 2004, an administrative judge dismissed plaintiff’s claim because plaintiff failed to meet with a EEO  
6 Counselor within forty-five days of the alleged discriminatory incident as required by 29 C.F.R.  
7 §§ 1614.105(a)(1) and 1614.107(a)(2). On October 28, 2004, the SSA adopted the administrative  
8 judge’s decision and dismissed the complaint. Plaintiff appealed the agency’s order to the U.S. Equal  
9 Employment Opportunity Commission, Office of Federal Operations (“EEOC”). On February 24, 2005,  
10 the EEOC affirmed the agency’s order and issued a Notice-of-Right-to-Sue letter. On April 15, 2005,  
11 plaintiff filed the instant complaint for race discrimination.

## **LEGAL STANDARD**

14       Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge a federal court's jurisdiction  
15 over the subject matter of a complaint. As the party invoking the jurisdiction of the federal court, the  
16 plaintiff bears the burden of establishing that the court has the requisite subject matter jurisdiction to  
17 grant the relief requested. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 376-78,  
18 114 S.Ct. 1673, 1675 (1994) (citation omitted). A complaint will be dismissed if, looking at the  
19 complaint as a whole, it appears to lack federal jurisdiction either "facially" or "factually." *Thornhill*  
20 *Publishing Co., Inc. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). All material  
21 allegations in the complaint will be taken as true and construed in the light most favorable to the  
22 plaintiff. *NL Indus. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). A motion to dismiss will be granted  
23 only if the plaintiff has failed to allege an element necessary for subject matter jurisdiction under a given  
24 statute. *See* 2A James W. Moore et.al., *Moore's Federal Practice* ¶ 12.07-2.1 (2d ed. 1987).

## DISCUSSION

27 The only issue on this motion to dismiss is whether plaintiff's complaint is time-barred. 29  
28 C.F.R. § 1614.107 states in relevant part, “[p]rior to a request for a hearing in a case, the agency shall

United States District Court  
For the Northern District of California

1 dismiss an entire complaint . . . [t]hat fails to comply with the applicable time limits contained in []§  
2 1614.105.” Furthermore, 29 C.F.R. § 1614.105(a) states in relevant part:

3 (a) Aggrieved persons who believe they have been discriminated against on the basis of  
4 race, color, religion, sex, national origin, age or handicap must consult a  
[EEO]Counselor prior to filing a complaint in order to try to informally resolve the  
matter.

5 (1) An aggrieved person must initiate contact with a Counselor within 45 days  
6 of the date of the matter alleged to be discriminatory or, in the case of personnel action,  
within 45 days of the effective date of the action.

7 (2) The agency or the Commission shall extend the 45-day time limit in  
8 paragraph (a)(1) of this section when the individual shows that he or she was not notified  
9 of the time limits and was not otherwise aware of them, that he or she did not know and  
reasonably should not have been known that the discriminatory matter or personnel  
action occurred, that despite due diligence he or she was prevented by circumstances  
beyond his or her control from contacting the counselor within the time limits, or for  
other reasons considered sufficient by the agency or the Commission.

11 As evidenced by plaintiff’s email, the allegedly discriminatory act took place on June 25, 2002.  
12 Further, it is undisputed that plaintiff failed to meet with an EEO Counselor within the forty-five day  
13 window required by 29 C.F.R. § 1614.105(a)(1). As a result, defendant argues, plaintiff has failed to  
14 comply with the regulatory requirements and the Court lacks subject matter jurisdiction over plaintiff’s  
15 complaint. *See Lyons v. England*, 307 F.3d 1092, 1105 (9th Cir. 2002).

16 Plaintiff argues that the forty-five day statute of limitation should not bar her case because her  
17 situation falls within the exceptions stated in 29 C.F.R. § 1614.105(a)(2). First, plaintiff claims that she  
18 was unaware of the 45-day time limit. *See Decl. of Shamecca Swisher*, ¶¶ 2-5. In a declaration, plaintiff  
19 makes numerous statements to that effect, including: “[d]uring the time I have worked at SSA I did not  
20 know anything about reporting a complaint of discrimination, it was new to me,” “I had no idea . . . that  
21 I had to report this sort of thing to an EEO Counselor,” “I have never been instructed that I had to report  
22 incidents of discrimination to an EEO Counselor,” and “[t]here has never been bulletin board posters  
23 at my office saying anything about reporting incidents of discrimination [] to an EEO Counselor, let  
24 alone that it had to be reported within 45 days.” *Id.*

25 Defendant argues that plaintiff had constructive notice of the 45-day limit on June 25, 2002,  
26 when she contacted her union representative who was familiar with the deadline. In *Johnson v.*  
27 *Henderson*, 314 F.3d 409 (9th Cir. 2002), the court held that when a plaintiff retains counsel, she  
28

1 “gain[s] the means of knowledge of her rights and can be charged with constructive knowledge of the  
2 law’s requirements.” *Id.* at 414. Defendant has not convinced the Court, however, that a union  
3 representative is analogous to a lawyer, and the Court declines to extend *Johnson* into new territory.<sup>1</sup>  
4 Furthermore, although the 45-day limit should only be tolled in “extraordinary and carefully  
5 circumscribed instances,” *Carter v. Greenspan*, 304 F. Supp. 2d 13, 23 (D.D.C. 2004), plaintiff’s lack  
6 of knowledge brings her case clearly under the express terms of § 1614.105(a)(2).

7 In addition, the Court does not believe that plaintiff’s June 25, 2002, email is sufficient to  
8 establish a “reasonable suspicion” that a discriminatory act had occurred. *See* 29 C.F.R. §  
9 1614.105(a)(2). The only ground for suspicion raised in the email is the last name of the person hired.  
10 It is clear that plaintiff was not aware of other important information, such as race, qualifications, and  
11 whether the candidate was hired from within. Plaintiff did not jump to conclusions, but diligently  
12 investigated the situation and waited until she found out that only African Americans were on the “Well  
13 Qualified List” and that the person hired was not on that list before she complained. Pl. Oppo. Br., Exh.  
14 A, at 2. Such conduct should be encouraged.

15  
16 **CONCLUSION**

17 For the foregoing reasons and for good cause shown, the Court DENIES defendant’s motion to  
18 dismiss (Docket No. 22).

19  
20 **IT IS SO ORDERED.**

21  
22 Dated: February 28, 2006

23  
24   
25 SUSAN ILLSTON  
26 United States District Judge  
27

28 

---

<sup>1</sup>The Court also notes that plaintiff initially proceeded *pro se* in these proceedings.